

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-1425

To be argued by
HENRY PUTZEL, III

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DOCKET NO. 77-1425

UNITED STATES OF AMERICA,

Appellee,

-against-

MICHAEL J. CAPANEGRO,

Defendant-Appellant.

On Appeal From The United States District
Court For The Southern District of New York

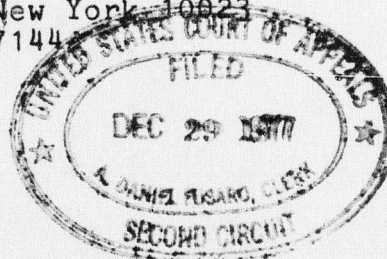
BRIEF FOR THE APPELLANT
MICHAEL J. CAPANEGRO

HENRY PUTZEL, III
Attorney for Defendant-Appellant
Michael J. Capanegro
140 West 62nd Street
New York, New York 10023
(212) 956-7144

Of Counsel:
Michael J. Capanegro,
pro se

Donna M. Zerbo, Law
Student Assistant

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P/S

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UNITED STATES OF AMERICA,

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BRIEF FOR THE APPELLANT
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PRELIMINARY
STATEMENT

Michael J. Capanegro appeals from a judgment of conviction entered in the United States District Court for the Southern District of New York following a bench trial before the Honorable Thomas P. Griesa, United States District Judge, from June 20 through July 7, 1977.

The judgment of conviction was entered on 17 counts of an indictment charging the defendant in 24

counts with embezzlement of funds from a labor union in violation of Title 29, United States Code, Section 501(c).

Indictment 76 Cr. 914 was filed on September 24, 1976. It charged that in late 1971 and early 1972 Mr. Capanegro, an attorney, had unlawfully embezzled funds from the Local 1101 Defense Fund (the "Defense Fund") of the Communication Workers of America (the "union" or "Local 1101") by submitting bills to the Defense Fund for legal services to individual union members, knowing that such bills overstated "the nature and value of the services performed" [A.1*] Each of the twenty-four counts of the indictment specified the name of the individual union member whom Mr. Capanegro represented, the dates of billing and payment, and the amount received for such services. Nine of the counts of the indictment related to bills of \$1,000 or less; thirteen of the counts related to bills between \$1,000 and \$2,000; and the remaining two counts related to bills of \$4,500 and \$5,400, respectively. The total amount of moneys allegedly embezzled with respect to legal services for 26 clients was \$36,900. Sig-

* "A." indicates the joint appendix to be filed by both parties pursuant to Rule 30(c), Fed. R. App. Proc.; "T." indicates the stenographic transcript of the trial; "GX." indicates a Government Exhibit at trial; "DX." indicates a Defense Exhibit at trial.

nificantly, the indictment made no charge that Mr. Capanegro had submitted bills for non-existent clients or non-union members, nor did it allege that he had rendered no services to the union members whom he represented. Rather, it charged twenty-four instances of "vastly overstated" bills. Finally, the indictment made no charge that the defendant had aided and abetted a union officer or employee in a scheme of embezzlement. Instead, the indictment charged that in acting as attorney for each of the individual union members and in receiving compensation from the Defense Fund, Mr. Capanegro was "employed directly or indirectly" by the union and was therefore a principal. [A. 1-2]

Trial commenced before Judge Griesa on June 20, 1977, following the waiver of a trial by jury by the defendant. On July 7, 1977, at the conclusion of summations, the Court announced general findings convicting the defendant on Counts 1-3, 5-8, 10-12, 15-17, and 21-24 and finding him not guilty on Counts 4, 9, 13-14 and 18-20. By opinion dated July 19, 1977 [A. 3-36], the Court filed special findings of fact pursuant to Rule 23(c), Fed. R. Crim. Proc. On September 27, 1977, Judge Griesa imposed concurrent sentences of one year's imprisonment

upon each count on which the defendant was convicted. On October 13, 1977 the Court re-sentenced the defendant -- at Mr. Capanegro's request -- to concurrent terms of imprisonment for a year-and-a-day on each count, in order that he might be eligible for parole after the expiration of one-third of the sentence imposed. The defendant is on his own recognizance pending this appeal.

ISSUES PRESENTED

1. Is an attorney engaged in the private practice of law an "employee" of a labor union within the meaning of 29 U.S.C. § 501(c) merely because he represents such union on a general retainer and also represents individual union members in criminal cases upon the recommendation of union executives?

2. Did the Court properly find that the defendant, in submitting bills for legal services to a labor union, had defrauded the union in light of (a) a total absence of proof establishing a standard by which to measure such fees; (b) uncontradicted evidence that the union's president had approved both the defendant's legal services and his bills therefor; and (c) uncontradicted evidence

that such bills were authorized by the union, submitted by the defendant in the regular course of his business and openly recorded on the books of the union?

3. Was the trial court inconsistent in finding that certain in futuro bills of the defendant were submitted as good faith estimates of future services, while other identical bills were fraudulent?

4. Was the prosecution collaterally estopped from bringing criminal charges against this defendant under 29 U.S.C. § 501(c) against this defendant in light of the previous settlement with prejudice of a civil case brought by the union against the same defendant on the same facts pursuant to the provisions of 29 U.S.C. § 501 (a) and (b)?

4. Did the Court erroneously apply the civil theory of quantum meruit to the facts at bar?

STATEMENT OF FACTS

Introduction

From the summer of 1971 through February 18, 1972, Local 1101 of the Communications Workers of America struck against the New York Telephone Company. Throughout the strike, and particularly in its final phases, individual members of the union would, from time to time, need personal legal assistance because of incidents of violence occurring during the often bitter confrontations between union and management personnel and between pro-strike and anti-strike members of the union and its various locals. Such legal assistance often required that counsel be retained to represent individuals charged with crimes ranging from disorderly conduct to arson. At other times, union members needed counsel in order to press criminal complaints against others. By a policy of the union, Local 1101's members were to be paid from the Defense Fund of the union. This case arises from the legal services provided to certain union members by one of several attorneys who were retained for such purpose, the defendant Capanegro.

Michael J. Capanegro, a member in good standing of the New York Bar for over twenty years and a three-

term member of the New York State Assembly, was engaged in the private practice of law from his offices in Flushing, Queens. The record was undisputed that Mr. Capanegro had never before this case been disciplined in any manner or prosecuted for any crime and, on a more positive note, that he had achieved a reputation for probity, honesty and dedication to his community.* Mr. Capanegro's law practice consisted of a wide range of legal matters but included a substantial concentration of criminal work in state courts.** [T. 743-751]

In 1970, Mr. Capanegro was retained by Richard Carnivale, a long-time client, to represent Carnivale

* Six character witnesses, including three Justices of the Supreme Court, State of New York, testified as character witnesses on behalf of Mr. Capanegro. While we recognize that such evidence does not bear directly on the facts pertinent to this appeal, we encourage this Court to note such testimony [T. 692-722, 722-732, 733-735, 735-740, 740-743, 890-894] as tending to disprove the Government's fundamental assertion that Mr. Capanegro submitted legal bills to the union with intent to defraud.

** During his service in the Assembly, Mr. Capanegro became the ranking minority member of the Codes Committee, charged with enactment of criminal statutes. His early law practice, in association with another more senior practitioner, was almost exclusively in criminal law. [T. 747-750.]

during his hotly contested campaign for the presidency of Local 1101 of the Communications Workers of America.* After several disputed elections, during which Capanegro represented Carnivale, the Carnivale slate were certified by the U.S. Department of Labor as winners of the election, and upon Carnivale's certification, he retained Mr. Capanegro as counsel to the union at an annual retainer of \$25,000.

The retainer agreement [GX. 13] obligated Capanegro to work on a variety of union matters, including leases, N.L.R.B. hearings, grievance procedures, conferences and so forth. It did not cover any criminal work on behalf of either the union or individual union members. At no time was Mr. Capanegro an officer, employee, or member of the union. There was no evidence that he received pension or medical benefits, life insurance, or any of the

* Carnivale was subpoenaed as a Government witness at trial but, through counsel, declared his intention of asserting his Fifth Amendment privilege if asked questions by either the prosecution or defense. It was thus agreed that he was unavailable to either side [T. 438-9]. The Government adduced no evidence whatsoever to contradict Capanegro's extensive testimony that he conferred on an almost daily basis with Carnivale and that Carnivale approved both the services which Capanegro rendered union members and the fees which he charged. See, post, Point Two.

other indicia of union employment. He continued to practice law from his offices in Flushing, Queens and did not maintain an office at the union. His sole relationship to the union -- in addition to the retainer described above -- was as counsel retained by individual union members in need of legal advice. In this respect, the evidence was clear that Mr. Capanegro was recommended by Carnivale, the president of the local, or by other union officials, but union members were free to retain other counsel and occasionally did so.* Once Mr. Capanegro or any other attorney was retained, the Defense Fund paid for the legal expenses. [T. 750-765, 921-925]

Following his retainer by the local, Mr. Capanegro undertook various legal services on behalf of the union. Among other matters, he negotiated an amicable settlement of a dispute between Local 1101 and the New York law firm of Cunningham & Kaming over a \$35,000 bill submitted to the union with respect to that firm's representation of union members involved in approximately eighteen misdemeanor cases arising from a thirteen-day

* The record of the trial discloses the names of several other attorneys who represented union members on the same basis as Mr. Capanegro. The Government called no expert or union representative to testify to the standard means of setting a fee in such cases.

wildcat strike in January, 1971.* Following negotiation, the parties agreed to settle the bill for a total of \$20,750. [T. 767-69, 975-86; GX. 46A-F.]

In August of 1971, Local 1101 commenced its strike against the New York Telephone Company. As incidents of violence began to occur, union members were referred with increasing frequency to the defendant for representation with respect to criminal charges either pending against such individuals or to be brought by them against others. Capanegro discussed with Carnivale his billing procedures and explicitly advised Carnivale that his fees would approximate \$2,000 for every misdemeanor or violation. [T. 771-2, 925] By time-honored practice, bills were to be submitted in advance of the performance of actual services, and, in boilerplate language, they recited both services which had already been rendered and

* The defendant offered in evidence copies of correspondence with the United States Department of Labor in which he inquired on behalf of the union whether the union could properly pay the legal bills of members charged with crimes during strike-related activities. [DX. A and B.] Because the Department took no position with respect to the issue, Mr. Capanegro advised the membership against authorizing such payments during a Felt Forum meeting of the Local on June 9, 1971. The membership rejected his advice and authorized the payment of legal fees from the Defense Fund. [T. 769-771, 972-75]

those which the defendant anticipated rendering the particular client in the future. [T. 770-2]*

Prior to the commencement of the strike in August, 1971 Capanegro, a single practitioner, had engaged in an active but manageable practice. With the violent incidents and consequent arrests referred to above, the pace changed drastically. The defendant testified: "I was in three or four courts a day. I was working well into the night on my dictating machine . . . In the meantime cases were coming in . . . There was like three or four cases a day coming in to my office. I was going out into the courts and representing these people." [T. 774]**

Capanegro soon established a standard billing procedure in his office. Once a client had been referred to him and he had assessed the gravity and complexity of

* In acquitting the defendant on Counts 13, 14, 18, 19 and 20, Judge Griesa credited the defendant's testimony that he had submitted the legal bills in question as a good faith estimate of the services which he expected to render and the legal fee to be charged therefor. On other counts -- specifically Counts 1-3, 5-8, 10-12 and 21-24 -- the Court found that the bills were not "good faith estimates of services to be performed" even though a substantial number of such bills were submitted at the same time as the bills underlying the not guilty counts. See, post, Point Three.

** The defendant added that, for certain cases, he charged nothing, either to the individual or to the union. [T. 775.] Although the indictment alleged only twenty-four specific instances in which the defendant's bills constituted alleged acts of embezzlement, the Government offered proof that Mr. Capanegro had submitted bills relating to some fifty-seven cases, the total legal fees for such cases amounting to \$117,000.

the case, Capanegro would direct his secretary to open a new file, enter the forthcoming court appearance in a diary and send a bill to the union. In almost every instance, Capanegro would dictate "boilerplate" language for such bill, and his secretary, having transcribed the dictation, would forward the bill to the union -- sometimes after one or two weeks. In virtually every case, Mr. Capanegro interviewed the particular client, placed his notes in a newly-opened file and, having projected a proper fee on the basis of the seriousness of the offense, he would direct his secretary to send a bill directly to the union.* In no instance did Capanegro send a second bill at a later date. Payment by the local was made in the form of checks signed by Carnivale and James Fitzgerald, treasurer of the local, and generally made out in Carnivale's handwriting.** [T. 778-783, 832]

* Capanegro testified that he explicitly advised Carnivale that he would charge up to \$2,000 for each misdemeanor or violation which he handled. [T. 771-2, 925]

** During the course of the Grand Jury investigation in this case, the defendant voluntarily turned over to Government counsel all of the files underlying the cases in question. The Government offered such files in evidence, together with court documents relating to the respective cases, and Mr. Capanegro confirmed the authenticity of such files and documents. [T. 785-6] Cf. United States v. Hart, 417 F. Supp. 1314 (S.D.Iowa 1976), (evidence that legal bills were openly submitted, paid and recorded on the union's books held to show absence of intent to defraud a labor union)

The Government adduced no evidence whatsoever to show that the bills submitted by Capanegro in any way deceived or misled Carnivale. The defendant, for his part, testified extensively concerning the approval which Carnivale and others in the hierarchy of the local gave to his representation of union members and to the fees which he was charging for such services. [T. 77⁸-82]

The evidence offered with respect to each respective counts of the indictment -- and the Court's special findings with respect to such evidence -- were as follows:

Count One

On December 3, 1971, Michael Rosso, a telephone company installer, was charged with disorderly conduct while picketing in Suffolk County. Released on bail, Rosso contacted Local 1101 in an effort to secure legal counsel regarding his pending court appearance. The union referred him to Mr. Capanegro, and the two discussed the details of the case by telephone. Because the matter was to be litigated in Suffolk County, Capanegro contacted John Clayton, Esq., a Long Island attorney, who agreed to represent Rosso for \$250, provided that no inordinate amount of work would be involved in the case. On December 10, 1971, Capanegro submitted a bill for \$1,850

to Local 1101 for services to be rendered Rosso and, having received payment from the union on December 16, 1971, Capanegro remitted \$250 to Clayton on January 4, 1972.* Clayton also assured Capanegro that the case would receive appropriate attention and that he would advise Capanegro of developing details. Capanegro testified that he always intended to retain another attorney to represent Rosso and that his in futuro bill was submitted to the Union with such intention. Thereafter, on March 24, 1972, Rosso received an adjournment in contemplation of dismissal ("ACD"). [T. 331-348, 349-384, 989-1001]

In convicting the defendant on Count One, the Court found that Capanegro received payment for the Rosso case "knowing that it was almost entirely a statement of services which he had not rendered and had no intention of rendering". [Emphasis supplied] The Court also found that "Capanegro failed to send a corrected bill to Local 1101 or to refund any part of the remaining \$1,600". [A. 6-8]

Counts Two and Three

On December 13, 1971, Lloyd Harold and Frank Carlo, two members of Local 1101, were arrested during a

* Clayton's in futuro bill was submitted to Capanegro on December 15, 1971. [T. 357-8]

picket line disturbance and charged with disorderly conduct. Each was released on his own recognizance and shortly thereafter contacted the union to obtain legal counsel. Carnivale referred them directly to Capanegro. Capanegro submitted his in futuro bills of \$1,300 per person to the union on December 16, 1971 and received immediate payment. Upon visiting the defendant's office, Harold received an affidavit executed by Capanegro applying for an adjournment because the counsel was unavailable for the scheduled arraignment date.

On December 22, 1971, the date scheduled for arraignment, the two appeared in court but did not present the affidavit previously given them, even after receiving the assurance of Capanegro's secretary that the matter would be adjourned upon the representations contained in the affidavit. When Harold and Carlo became apprehensive, they telephoned the union, and an attorney named Udoff -- who normally handled workmen's compensation for Local 1101 -- appeared and, unexpectedly, obtained ACD's for each defendant. [T. 391-406, 412-420, 1023-42]

In convicting Capanegro on Counts 2 and 3, the Court rejected the defendant's testimony that the bills were submitted in anticipation of representing Harold and Carlo on an adjourned date and found that Capanegro had

billed for services which he knew he had not rendered. The Court further found that, by charging separately for Harold and Carlo, Capanegro had fraudulently inflated the legal fee which he charged. [A. 8-10]

Count Four

On January 3, 1972, Dennis Lincoln, Robert Ast and Nick Fittipaldi, three Local 1101 members, were involved in a violent picket-line skirmish in which Lincoln was clubbed with a lead pipe by telephone company antagonists. Capanegro interviewed Lincoln and Fittipaldi at the January 6, 1972 Criminal Court arraignment in which the complaint was filed on behalf of his clients. He also introduced them to the Assistant District Attorney in charge of the matter. Capanegro's bill of \$1,000 for his services to the three union members was submitted on January 7, 1972 and paid on January 26, 1972. [T. 421-437, 536-551, 1062-1102] The Court acquitted the defendant of the charge in Count 4, finding that "I cannot find beyond a reasonable doubt that Capanegro knew he was not entitled to this fee." [A. 10-11]

Count Five

In December, 1971, Paul Radloff was brushed by a moving car while picketing a telephone company garage.

Radloff complained to his shop steward and to Carnivale, who contacted Capanegro. Capanegro discussed the incident with Radloff and advised him of its legal ramifications. Specifically, he advised Radloff of the procedure by which to file a criminal complaint, but Radloff, contrary to advice, never filed a formal complaint against the driver of the car. Capanegro, who believed that such a complaint was forthcoming, stood by to represent Radloff in the matter and to defend Radloff against any cross-complaint against him. Radloff failed to advise his attorney that he had not taken any action. On January 7, 1972, Capanegro submitted a bill of \$1,075 for his anticipated services and received payment on January 26, 1972. Capanegro testified that the amount of the bill included both his past advice and anticipated representation in the event that a complaint was filed. [T. 194-214, 1102-1112] In convicting the defendant, the Court found that the bill was submitted knowing that such services were not rendered and that such bill did not represent a good faith estimate of future services. [A. 9-11]

Counts Six and Seven

On January 10, 1972, Hal Dolgin and Duncan Hevenor, two members of Local 1101, were involved in a picket-line scuffle. Police advised the men to make a complaint against their antagonist in anticipation that

they themselves would be made the subjects of a complaint. Hevenor conferred with Carnivale who advised him that Capanegro would be informed and would handle the matter. In anticipation of performing legal services, Capanegro submitted bills for \$1,075 and \$1,000 to the union on January 13, 1972 and received payment on February 1, 1972. He testified that he understood that his services would be needed and that he stood ready to render legal service. Neither Hevenor nor Dolgin thereafter contacted the attorney, however, and the matter dropped. [T. 474-84, 1113-22] In convicting the defendant, the Court rejected the defendant's assertion that the bill anticipated future services which never materialized. [A. 11-12]

Count Eight

On January 11, 1972, Giose Franco, another member of Local 1101, was called to a police station but was informed upon arrival that he had been mistakenly summoned. The police nevertheless sought to question Franco, but he refused to answer questions. Thereafter, Franco informed his shop steward about the incident, and, according to Mr. Capanegro, either the union or Franco himself informed the defendant of the situation that same day. On January 13, 1972, Capanegro submitted a \$750 bill to Local 1101

in anticipation of a possible civil suit for false arrest, and he received payment on February 11, 1972. Franco never pursued the matter, however, and nothing further developed. [T. 552-63, 1123-31] In convicting the defendant, the Court found that Capanegro had been advised of the Franco case either by his client or by the union but rejected the assertion that the bill was submitted in futuro. [A. 14-15]

Count Nine

On January 7, 1972, Robert Zappulla was involved in an incident concerning a telephone company truck and was summoned by police to the local precinct. Instead, Zappulla contacted the union and was referred to Mr. Capanegro. On January 10, 1972, Zappulla related the incident to Capanegro, who advised him to obey the police order but not to incriminate himself. Capanegro testified that on the same day he made several calls to the police station before Zappulla's 2:30 P.M. appointment and negotiated Zappulla's release. On January 13, 1972, Capanegro rendered a bill of \$500 to the Local 1101 for the time spent on the Zappulla incident and he received satisfaction on February 11, 1972. [T. 565-578, 1136-1137]

In finding the defendant not guilty, the Court apparently credited Capanegro's testimony that "he made a telephone call to the police and negotiated Zappulla's release." [A. 14-15]

Count Ten

On January 10, 1972, John Hyland was struck by a telephone company truck while on picket duty. Hyland notified Carnivale, who called Capanegro. Within several minutes, Capanegro telephoned Hyland and advised him to file a complaint at the local precinct and to keep Capanegro apprised of the situation. Hyland filed a complaint the same day. Thereafter, Hyland testified that he met with Capanegro both at his Flushing office and at a social gathering where the two discussed the case. On January 14, 1972, Capanegro rendered a \$950 bill to Local 1101 concerning the Hyland matter and a possible civil suit against the truck driver. Payment was received on February 11, 1972. However, although a complaint was filed, efforts to bring about a subsequent suit failed because of Hyland's inability to identify the truck driver. [T. 580-6, 596-603, 1141-8] In finding the defendant guilty, the Court rejected the assertion that the bill was submitted in futuro. [A. 17-18]

Count Eleven .

On January 14, 1972, Joseph Cassidy was arrested and charged with disorderly conduct regarding a strike-related incident. At arraignment that same day, he was told to return January 26, 1972. The following day, Cas-

sidy went to the union and received Capanegro's address. Thereafter, Cassidy met for an hour with Capanegro in his Flushing office and discussed the case, and Capanegro advised Cassidy to produce his witnesses in court. On January 26, 1972, Capanegro represented Cassidy in his court appearance and obtained an ACD. Jacob Adler, another union member, also appeared on January 26, 1972 with Cassidy and Capanegro. Although the Adler case was not included among the charges in the indictment, evidence of Adler's appearance on that date was received as bearing on the Cassidy matter. On January 31, 1972, Capanegro submitted bills of \$1,375 and \$1,325 to the union for the services rendered to Cassidy and Adler, respectively.* He received payment on February 24, 1972. [T. 305-324, 1148-60]

In convicting the defendant, the Court disregarded Capanegro's testimony both concerning the basis by which he set fees and the fact that the bill had been dictated in futuro and instead stressed that, although Capanegro successfully performed legal services for each client, his method of separate billing was used to inflate his fees. [A. 18-20]

* Capanegro's bill was dictated in futuro on January 20 or 21, 1972 and held by his secretary for submission with a substantial number of other bills. [T. 1159]

Count Twelve

On January 19, 1972, John Toomey, a striking union member, was arrested for four misdemeanor charges arising from the malicious destruction of pay telephones. Toomey was taken to the court later that morning and told to return on January 26, 1972. Shortly thereafter Toomey was referred by the union to Capanegro. They met at Capanegro's law office and discussed the seriousness of the charges. Capanegro testified that prior to the January 26 court appearance, he made various unsuccessful attempts to have the charges reduced. At the January 26 appearance, Capanegro represented Toomey and disposed of all the charges by a plea to one count of disorderly conduct, a violation. Toomey was conditionally discharged. On January 31, 1972, Capanegro rendered a bill (which he had previously dictated) of \$5,400 to the Local 1101, and he received payment on February 24, 1972. [T. 451-468, 1160-81]

In convicting the defendant, the Court again found that even though Capanegro performed legal services successfully, he submitted an exaggerated bill, knowing he was not entitled to the fee. [A. 21-22]

Count Thirteen

Anthony Califra was arrested on January 19, 1972, charged with disorderly conduct occurring during the

strike and told to return to court on February 4, 1972. Shortly thereafter, Califra informed Carnivale of the incident and Carnivale contacted Capanegro. Testimony established that a co-defendant, Fasano, who was also arrested with Califra, met with Capanegro concerning his court appearance on February 4 and that Califra may also have done so. Capanegro represented Califra at his court appearance and obtained an ACD. On January 31, 1972, Capanegro submitted a \$1,550 in futuro bill to Local 1101 for his legal services regarding the Califra matter. Capanegro received payment on February 24, 1972. [T. 651-63, 1189-96].

In contrast to similar counts, the Court found Capanegro not guilty on Count 13, finding that the Government's evidence was insufficient to disprove Capanegro's assertion that the bill was a good faith estimate of services. [A. 22-23]

Count Fourteen

On January 20, 1972 Michael Block was arrested in connection with a strike-related incident and at arraignment was told to return on January 27, 1972. Block contacted a union shop steward who referred him to Capanegro. Attorney and client discussed the incident at Capanegro's Flushing office and because of a prior commitment, Capanegro gave Block an affidavit to obtain an ad-

journalment of the scheduled January 27, 1972 appearance. On the second return date, Capanegro was also engaged and obtained another adjournment. On March 24, 1972, Capanegro represented Block in court and the case was dismissed upon the failure of a telephone company complainant to appear. Capanegro's January 31 bill of \$1,725 was found by Judge Griesa to seek compensation for future court appearances, and the defendant was therefore acquitted of this charge. [T. 236-53, 260-6, 268-77, 1216-35]

Counts Fifteen, Sixteen and Seventeen

Robert Neri, Theodore Wallen and Steve Dzubay were arrested on January 12, 1972 for disorderly conduct occurring during a demonstration at a telephone company building. The three men were given a return date of January 17, 1972. Capanegro was retained by the union to represent all three men. On January 17, 1972, Capanegro appeared with his clients in court but failed initially to obtain a dismissal, and the matter was placed on second call. During the intervening two hours, Capanegro intermittently interviewed several witnesses and conferred with the Assistant District Attorney. Upon re-call of the cases, the prosecutor consented to a dismissal, and each defendant received an ACD. On January 31, 1972, Capanegro submitted bills of \$1,850, \$2,000 and \$1,850 for Neri, Wallen and

Dzubay, respectively, and received payment on February 24, 1972. [T. 263-253, 268-277, 1216-1235]

Although the Court credited Capanegro's testimony concerning his services -- and the success of his efforts -- it convicted the defendant on all three counts on the theory that the separate itemization as to each client "was intentionally calculated to collect a grossly exaggerated fee of \$5,700 . . ." [A. 25-27]

Count Eighteen

On February 2, 1972, Peter O'Neal was arrested for a strike-related incident of January 27, 1972. He was told to return on February 23, 1972. Although a member of Local 1103, O'Neal apparently utilized the legal services of Local 1101 as a result of a prior agreement between the presidents of the two locals. Capanegro held a brief conversation with O'Neal on the day of his arrest and initial court appearance and prepared an affidavit for O'Neal to adjourn the February 23, 1972 appearance until March 13, 1972. On that date, Capanegro represented O'Neal, and the case was dismissed because the telephone company dropped the charges. On February 17, 1972, Capanegro submitted a \$1,450 bill for past and future services rendered O'Neal. Payment was received on February 29, 1972. [T. 606-14, 1236-43]

The Court acquitted Capanegro on Count 18, holding that the bill was, in effect, a good faith estimate of Capanegro's services. The Court failed to distinguish between the O'Neill bill and similar bills which were found to have been rendered in bad faith. [A. 27-28]

Count Nineteen

Robert Pomposello was arrested on January 23, 1972 for assaulting a telephone workman on January 18, 1972. The police gave Pomposello a summons to appear in court on February 2, 1972. The following day, Pomposello informed Carnivale of the incident and was referred to Capanegro. After discussing the case with Capanegro, Pomposello obtained an affidavit, prepared by Capanegro, to adjourn the scheduled court appearance because Capanegro was unavailable on that day. The criminal court judge rescheduled the case for March 8, 1972, and Pomposello promptly informed Capanegro's office. On March 8, 1972, Capanegro appeared in court on behalf of Pomposello. He advised his client of three possible options and recommended that Pomposello opt for a trial by jury. Pomposello testified that Capanegro was willing to defend him if he elected the jury trial. Instead, Pomposello chose to plead guilty to harassment and received a conditional discharge. Capanegro's February 17, 1972 bill in

the amount of \$1,850 was paid on February 29, 1972. [T. 280-300, 1244-1251]

As in the previous count, the Court found the defendant not guilty on Count 19, but made no finding as to what distinguished this bill from previous similar billings on which Capanegro was convicted. [A. 26-7]

Count Twenty

Shortly before the conclusion of the strike, Walter Jasczuk, a member of Local 1101, was called by the police and questioned concerning his involvement in a fight during the strike between "scabs" and union members. Concerned about possible "homicidal assault" charges, Jasczuk contacted the union and was referred to Capanegro. Although Jasczuk could recall speaking to Capanegro's secretary, he could not recall speaking directly with his attorney. Capanegro, for his part, testified that he spoke with the client and produced notes of the conversation. [GX. 2000A] Capanegro also telephoned the detective in charge of the inquiry. No charges were ever brought. Capanegro's bill for \$250 was submitted February 17, 1972 and paid later that month. The Court credited Capanegro's testimony and acquitted the defendant on this count. [T. 493-502, 1252-57; A. 29-30]

Count Twenty-One

Toward the end of the strike, Juan Lopez, another union member, was involved in a scuffle with a telephone company foreman. Lopez expecting that a complaint would be filed against him, telephoned the union and was referred to Capanegro, who conferred with him in the expectation that such charges would materialize. Capanegro billed the union for \$750 on February 17, 1972 and received payment on February 29. He testified that he anticipated representing Lopez on charges to be filed. [T. 440-48, 1258-60] In convicting on Count 21, the Court found that the bill was "almost entirely a statement of services which had not been rendered" and rejected the testimony that the bill was a good faith estimate of future services. [A. 31]

County Twenty-Two

On January 23, 1972, Michael Antonucci, a union member, was involved in a knife fight with a neighbor which was unrelated to the strike. Shortly thereafter, Antonucci, while at the union offices, learned that a detective was looking for him in order to arrest him. While at union headquarters, Antonucci met Capanegro, discussed the case with him and thereafter advised him that he intended to retain Robert Schwartz, Esq., another attorney. Capanegro's file discloses notes of conversations with union representatives and with Antonucci, and the defend-

ant recalled representing Antonnucci for a period of time before Schwartz was retained. Capanegro's bill for \$875 was sent on February 17 1972 and paid twelve days later. [T. 485-492, 530-33,] The Court found the defendant guilty of Count 22 on the basis that Capanegro obtained payment of \$875 which "he knew he was not entitled to." [A. 32]

Count Twenty-Three

Toward the end of January, 1972, Jack Russek, a member of Local 1101, was struck by a telephone company truck while he was picketing. Russek filed a complaint at the local precinct and later received a notice to appear as complainant on the charges on March 3, 1972. He applied to the union for a lawyer and was told to call Capanegro. Capanegro discussed the case with the complainant and advised him that the District Attorney would handle the matter. Capanegro's diary reflects that he conferred on the morning of March 3 with the Assistant District Attorney.* Later that morning, Russek appeared and dropped the charges. Capanegro submitted his bill of \$675 on February 17, 1972 -- before the disposition of the case -- and received payment on February 29, 1972. The Court convicted on Count

* The Government argued that the entry in the diary was false but produced no evidence to support such allegation. The defendant, for his part, affirmed the validity of the entry [T. 1275-84] The Court made no special finding with respect to such evidence.

23, holding that the bill was "almost entirely a statement of services which had not been rendered." [A. 34]

Count Twenty-Four

On January 31, 1972 Joseph McAleer, a Vice President of Local 1101, was involved in a picket line fight and was subsequently arrested and charged with two counts of felonious assault and an additional count of unlawfully possessing a weapon. [GX. 2402] McAleer was briefly jailed and then released on bail. Through Carnivale, he contacted Capanegro, who debriefed his client* and advised him that the felony charges were serious. Thereafter, without notifying Capanegro, McAleer retained Richard J. Friedman, Esq. to represent him and obtained \$1,000 from Carnivale for Friedman's retainer. Still believing that he would be appearing for McAleer, Capanegro submitted a \$4,500 bill to the union in connection with the felony charges and received payment on February 29, 1972.** In the following months, Friedman conferred with Capanegro and found him to be cooperative. [T. 703]. The charges were dismissed

* Capanegro's lengthy notes of the interview were received in evidence as GX. 2400-J. See T. 1288.

** As further evidence that Capanegro anticipated defending McAleer, the defendant's legal file contained an unfiled application for an adjournment of McAleer's scheduled March appearance in Bronx Criminal Court. [GX. 2400] [T. 1286] Finally, Capanegro testified that he sought to investigate the facts of the McAleer case. [T. 1310]

upon Friedman's motion on August 9, 1972. Friedman, having already received \$1,000 from the union, billed Capanegro for the balance of his fee and received \$1,500 from the defendant. [GX 2400-D]

The Court found that on February 17, "Capanegro knowingly billed for services he had not performed. This was not the case of a good faith estimate of services to be performed. At the very least, Capanegro should have refunded the \$4,500 to Local 1101 when he learned that Friedman was in the case, which was no later than mid-March." [A. 36] [T. 665-691, 701-721, 1285-1312]

* * *

In addition to proof elicited with respect to each count of the indictment, the Government offered evidence that Capanegro had represented some forty-five other union clients in thirty-one additional cases, none of which was made the basis for criminal charges. The evidence established that in each such case -- as in each of the cases particularized above -- (1) Capanegro in fact served as the attorney for a union member; (2) the client was referred directly to Capanegro by a union representative; (3) the union authorized payment of Capanegro's fee from its Defense Fund; (4) Capanegro conferred with each client; and (5) Capanegro opened and maintained a file in accordance with standard office procedures. The Court made no mention of such evidence in its special findings.

ARGUMENT

Point One

THE EVIDENCE ESTABLISHED THAT THE DEFENDANT WAS AN ATTORNEY ENGAGED IN THE PRIVATE PRACTICE OF LAW; HIS LEGAL SERVICES TO THE UNION AND ITS INDIVIDUAL MEMBERS DID NOT RENDER HIM AN EMPLOYEE OF THE UNION: THE COURT THEREFORE ERRED IN CON-
VICTING THE DEFENDANT UNDER 29 U.S.C. § 501(c)

The defendant was convicted of violating Title 29, United States Code, Section 501(c), which provides, in pertinent part:

Any person who embezzles, steals or unlawfully and willfully abstracts or converts to his own use . . . any of the moneys [or] funds . . . of a labor organization of which he is an officer, or by which he is employed, directly or indirectly . . . [commits a crime]

The government was thus required to prove as an essential element of the crimes charged in the indictment that the defendant was an officer or employee of the union. United States v. Hart, 417 F. Supp. 1314 (D.C. Iowa 1976). See, United States v. Dibrizzi, 393 F.2d 642 (2d. Cir. 1968). Concededly, Mr. Capanegro never held union office, nor was he even a member of Local 1101. Rather, the Government maintained at trial that the defendant was an "employee" of the union by virtue of the legal services which he rendered. Its precise contention was that, because the

defendant (a) had been retained as counsel to the union, and (b) was paid by the Defense Fund for his services to its individual members, he was an "employee" within the meaning of the Act. Both contentions are incorrect as a matter of law, and the Court therefore erred in concluding that the Government had satisfied its burden with respect to this crucial issue.*

* Judge Griesa's thirty-four page opinion setting forth his special findings contains only two passing references to the issue of employment. At page 3, he writes, "Capanegro is an attorney. During the relevant period in 1971-72 Capanegro was counsel to Local 1101 of the Communications Workers of America, under a \$25,000 per year retainer." [A. 5] And, in the concluding paragraph on page thirty-four, the court states in conclusory fashion: "Within the meaning of 29 U.S.C. § 501(c), I find that Local 1101 was a labor organization and that Capanegro was employed by it." [A. 36] With respect to the latter passage, the Court supplied no elaboration or other catalogue of facts or authorities supporting such conclusion. Judge Griesa's only other analysis of the issue came during pre-trial proceedings in which he denied the defendant's motion to dismiss on the ground that Capanegro was not an employee of the union. Then he observed, "there is no case directly in point. Obviously Mr. Capanegro was not an employee of the union in the narrow sense of that word. He was presumably an independent contractor. I am stating this obviously without benefit of the specific evidence, but that's the way it seems to shape up and probably will shape up under the evidence." [T. 13-14, Feb. 24, 1977] [Emphasis supplied.] The Court's observation leaves little doubt that he was measuring Capanegro's conduct by the erroneous "directly or indirectly" standard urged by the Government. In any event, Mr. Capanegro was not even indirectly employed by Local 1101 and may not be convicted under § 501(c).

It is axiomatic that, in construing any criminal statute, this Court must not "enlarge the reach of enacted crimes by constituting them from anything less than the incriminating components contemplated by the words used in the statute." Morissette v. United States, 342 U.S. 246, 263 (1952). This Court has been particularly vigilant to construe § 501(c) and other sections of the Landrum-Griffin Act consistently with the spirit and language of Morissette. See, United States v. Ferrara, 451 F.2d 91 (2d Cir. 1971); United States v. Ottley, 509 F.2d 667, 672, n. 7 (2d Cir. 1975).

The instant indictment itself betrays evident prosecutorial misgivings as to Mr. Capanegro's status vis a vis the union. It charges that the defendant embezzled from a labor organization "of which he was employed directly or indirectly as an attorney." [A. 1] Any Government contention that § 501(c) applies to persons "indirectly" employed by a labor organization is squarely rejected by this Court's consistent interpretation of the statutory phrase "directly or indirectly" as modifying the first phrase of the statute, describing the crime of embezzlement, not the phrase dealing with employment. "The statutory language condemns the embezzlement or conversion not only of moneys, funds and securities, but also

of 'property or other assets of a labor organization . . . directly or indirectly.'" United States v. Robinson, 512 F.2d 491 (2d Cir. 1975); United States v. Silverman, 430 F.2d 106, 113-14 (2d Cir. 1970), modified per curiam on other grounds, 439 F.2d 1198, cert. denied, 402 U.S. 953 (1971); United States v. Santiago, 528 F.2d 1130, 1135 (2d Cir. 1976), cert. denied, 425 U.S. 972 (1976), citing United States v. Vitale, 489 F.2d 1367, 1370 (6th Cir. 1974); United States v. Harrelson, 223 F. Supp. 869, 871 (E.D. Mich. 1963).*

Both the legislative history and the case law arising under 29 U.S.C. § 501(c) make clear that this section of the Landrum-Griffin Act sought to punish self-dealing by those with access to the funds of labor unions. Indeed, the repeated emphasis of each paragraph of § 501 upon the fiduciary obligations of union officers leaves no doubt that the statute applies only to insiders of labor organizations. Thus, § 501(a) carefully applies to "officers, agent, shop stewards, and other representatives of

* Indeed, in Silverman, supra, the Southern District prosecutor framed the indictment to eliminate any possible ambiguity as to the interpretation of the statute: "[T]he defendant, unlawfully, willfully and knowingly, directly and indirectly, did embezzle, steal, abstract and convert, to his own use. . . ." United States v. Silverman, supra, at 109-10. [Emphasis supplied.]

a labor organization," terms which are defined further in § 402(q) as including "elected officials and key administrative personnel, whether elected or appointed, (such as business agents, heads of departments or major units, and organizers who exercise independent authority), but does not include salaried nonsupervisory professional staff, stenographic, and service personnel." Similarly, § 501(b) applies only to the carefully defined class of union officers and agents described in subsection (a). Although subsection (c) by its terms applies to all officers and employees of a labor organization, it is clear that such language restricts the reach of the statute to insiders: "It was the plain intention of Congress to hold officers and employees strictly responsible as fiduciaries for the union funds entrusted to them . . ." United States v. Silverman, supra at 113, citing United States v. Harrelson, 233 F. Supp. 869 (E.D. Mich. 1963). See, Colella v. United States, 360 F.2d 792, 799-800 (1st Cir. 1974), cert. denied, 385 U.S. 829 (1966); United States v. Sullivan, 498 F.2d 146 (1st Cir. 1974), cert. denied, 419 U.S. 993 (1974). Indeed, as pointed out by Judge Friendly's majority opinion in Silverman, § 501(c) stems from similar embezzlement statutes to be found in Title 18: "Congress subjected union officers or employees to the same test of

criminality as government employees, bank officers and the like--not to a lower one." Id. at 127. See, 18 U.S.C. §§ 654-60. A fortiori, a non-employee of a labor union may no more be convicted under 29 U.S.C. § 501(c) than a non-officer or non-employee of a bank may be convicted as a principal under 18 U.S.C. § 656. See, United States v. Giordano, 489 F.2d 327, 330 (2d Cir. 1973).*

As pointed out consistently in the cases cited above, the legislative history of § 501(c) fully supports the thesis that the section is limited in its reach to officers and employees of a union, and not to the public at large. See generally, S. Rep. No. 187, 86th Cong., 1st Sess.; H.R. Rep. No. 741, 86th Cong., 1st Sess. (1959), U.S. Code Congressional and Administrative News, pp. 2318,

* It is, of course, possible to convict any non-employee or officer of accessorial liability under such statutes by alleging and proving that such individuals assisted a principal, who was such an employee, to embezzle funds. See, United States v. Giordano, supra. In contrast to Giordano, however, Capanegro was prosecuted as a principal, not as an aider and abettor. Carnivale, the union president was not charged with committing any crime, nor did the Government adduce proof of his complicity with Capanegro in a common scheme to overbill for legal fees and split the proceeds. Moreover, Judge Griesa's special findings make clear that Capanegro was convicted upon the theory that he was an employee, chargeable in his own right with violations of § 501(c).

et. seq. See, United States v. Colella, supra at 798; United States v. Silverman, supra, at 113-4, and authorities cited therein.

In the face of the substantial authority cited above, the Government contended at trial that § 501(c) reached the conduct of a private attorney whose "employment" amounted quite simply to the receipt of legal fees. Such contention distorts the plain meaning of the statute and broadens its applicability well beyond the intent of its framers.

With respect to each of the twenty-four counts of the indictment, Mr. Capanegro represented only individual union members, not the Local which had referred them to him. In every instance, he was contacted at his own office; conducted client interviews and made client appearances without any reference to the referring union; made decisions with respect to such representation without conferring with union officers; and, in short, independently discharged his obligations to his clients without any reference whatsoever to Local 1101 or its directorate. The sole connection of the union to any such case was that it referred such cases to Capanegro and undertook to pay his legal fees. In this respect, Capanegro was no more the employee of the union than is any attorney who represents one person or entity and is paid

by another.* And, like any such attorney, Capanegro owed a professional obligation to each client to protect only the interests of that client and not those of the union. Cf., Yablonski v. United Mine Workers, 448 F.2d 1175 and 454 F.2d 1043 (D.C. Cir. 1971). Under such circumstances, Capanegro was clearly not the "employee" of the union simply because he represented some of its members in an individual capacity.**

* DR 5-107(B) of the A.B.A. and New York State Code of Professional Responsibility make clear that Mr. Capanegro -- like any lawyer -- owed his undivided loyalty to each individual whom he represented, not to the union which paid him: "A lawyer shall not permit a person who pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services." See also, EC 5-18, 5-19.

** No court has yet considered the precise question at bar. One recent -- and strikingly similar -- case strongly supports Mr. Capanegro's assertion that the statute does not apply to attorneys in his circumstances. In United States v. Hart, *supra*, a union president was indicted under § 501(c) for allegedly paying the legal expenses of union members during a strike. Despite apparent allegations that the defendant acted with intent to defraud the union, the attorney who was the recipient of the union funds as legal fees was not even indicted. Upon a stipulated record, the Court acquitted the defendant, holding that the payments had been openly and properly recorded on the books of the union and that the defendant-President therefore acted openly and in good faith in authorizing their payment. *Id.*, at 1322. Clearly, not even the prosecution in Hart asserted that the recipient-attorney should have been held liable as an employee under the statute.

Indeed, any such claim plays havoc with the clear intent of the Congress to limit the reach of § 501(c) to insiders. As pointed out above, the statute was enacted in response to the looting of labor unions by corrupt officers and employees, persons who -- like any potential embezzlers -- had inherent access to the funds and assets of a labor organization and authority to misappropriate them. The defendant had no such authority. He was required to submit his bills to the union; without such bills, he could never have received payment. By no rational analysis could he have been considered an "employee" of the union in this respect".*

The Government also contended before Judge Griesa that the general retainer agreement between the local and Capanegro made the defendant an "employee" within the meaning of § 501(c). Such argument also lacks substance. The agreement itself explicitly provided, "That payment to the attorney [Capanegro] as hereinabove provided, does not include personal representation of any of the Union Officers

* The Government adduced no evidence of the usual indicia of employment. Capanegro was not on a union payroll; no deductions were taken for F.I.C.A. or Workmen's Compensation or for life and medical insurance; in short, there was no evidence of any employer-employee relationship to distinguish this case from the usual relationship of client and attorney.

or members in any personal matters not related to union business." [GX. 13; A. 39] And Capanegro testified without contradiction that the retainer did not encompass criminal representation of any person. [T. 922-24] In short, the agreement simply obligated Capanegro to perform a variety of legal services for the union which had absolutely nothing to do with the cases underlying the disputed bills.

Moreover, by the standards articulated in many different contexts in United States v. Silk, 331 U.S. 704, 716 (1947) and Bartels v. Birmingham, 332 U.S. 126, 130 (1947) Capanegro was quite clearly an "independent contractor" of the local and not its employee. See, United States v. Webb, Inc., 397 U.S. 179 (1970), Avis Rent-A-Car System, Inc. v. United States, 503 F.2d 423 (2d Cir. 1974), Radio City Music Hall Corp. v. United States, 135 F.2d 715, 717-8 (2d Cir. 1943) (L. Hand, J.)* With respect both to the legal services provided pursuant to the retainer and to those rendered individual union members,

* In the Radio City Music Hall case, Judge Hand distilled the test to the following formula: "The test lies in the degree to which the principal may intervene to control the details of the agent's performances; and that in the end is all that can be said * * *". Id.; see also, Judge Oakes's summary of the applicable criteria in Avis Rent-A-Car System, Inc. v. United States, supra, at 429; Lifetime Siding, Inc. v. United States, 359 F.2d 657, 660 (2d Cir. 1966).

he performed such services independently, without interference or control from the local. Moreover, the services without question involved a "special skill" distinct from the skills of union officials and employees. Compare with, Avis Rent-A-Car Systems, Inc. v. United States, supra. In short Capanegro was no more the employee of the union than was any physician, plumber, electrician or other independent contractor who supplied services to it and received compensation. The mere existence of a retainer agreement did not alter in any fashion the essential nature of the services performed, and those services did not constitute "employment" by the union within the meaning of § 501.

Point Two

THE COURT'S FINDING THAT CAPANEGRO HAD DEFRAUDED
THE UNION WAS UNSUPPORTED BY THE EVIDENCE IN
LIGHT OF (A) THE GOVERNMENT'S FAILURE TO
PROVE THAT THE LEGAL BILLS IN QUESTION WERE
SO HIGH AS TO CREATE AN INFERENCE OF FRAUD;
AND (B) THE UNDISPUTED PROOF THAT THE UNION'S
PRESIDENT KNEW AND APPROVED OF THE DEFENDANT'S
LEGAL SERVICES AND THE BILLS WHICH HE SUBMITTED

Although cases arising under § 501(c) in this
Circuit and elsewhere have proceeded on a number of differ-

ent theories, Government counsel in this case was explicit in his reliance on the simple assertion that Capanegro defrauded the union by submitting inflated bills which misrepresented the nature and extent of his services and that Capanegro thus knew at the time he submitted such bills that they would fraudulently mislead the union.* Counsel advanced two specific arguments in support of such claim: (1) that the apparent disparity between the amount of money charged and the services rendered by the defendant was in each case so substantial as to support an inference that the defendant knowingly defrauded the union; and (2) that the boilerplate language of the bills was a device used by the defendant intentionally to deceive the union at the time the bills were submitted. Neither theory is a tenable

* The Government did not rely upon the theory that such payments were improper because they were unauthorized or improperly authorized under the proper union procedures [T. 104-05] See, United States v. Ottley, supra; United States v. Goad, 490 F.2d 1158 (8th Cir.), cert. denied 417 U.S. 945 (1975); or that, in making such payments to Capanegro, the local received no benefit from his services, United States v. Silverman, supra; United States v. Robinson, supra; its sole claim was that Capanegro obtained union funds with fraudulent intent and was therefore guilty of violating § 501(c). Compare with United States v. Hart, supra.

one in light of the evidence adduced at trial, and the Court -- which adopted such theories in its special findings -- was therefore without a factual basis for finding that the defendant acted with fraudulent intent.

- A. The Court had no basis for concluding that the fees charged by Capanegro were so high as to create an inference of fraud.

During colloquy with Government counsel mid-way through his summation, the Court explicitly pointed to a crucial problem in the case:

"Now, Mr. Capanegro has testified, he testified this morning and he testified earlier on cross and he articulated the theory that he placed a value on his services according to the crime, and not that a violation is, you know, the most serious crime but the point was that even conviction of a violation subjected people to being fired from the telephone company, and his theory on his billing as he testified was that merely for getting someone off of a crime it is a valuable service and he would say worth \$1,375.

Now, can I say beyond a reasonable doubt that that is not so?" [T. 1450]

The observation lends emphasis to an important issue in this case. The defendant is a member of a profession which lacks any real standards concerning the amount of

money it bills its clients.* This Court may take judicial notice of the many fee applications in this forum, the district courts and state courts in which attorneys -- including respected members of the bar -- petition for multiples of the fee which the Court ultimately concludes they have earned. Perhaps in no other profession is there such an absence of standards governing the manner by which we set our fees.

In the context, then, of an almost total absence of standards, the defendant adduced proof as to the basis by which he submitted bills to the Defense Fund. He testified that his fee was based essentially upon the consequences of a conviction to his client. He stressed in this connection that union members convicted even of dis-

* See, generally, Nader and Green, "Don't Pay Those High Legal Bills", N.Y. Times, November 20, 1977, § 6 (Magazine) at 53. The Nader & Green article cites instances of overbilling which are far more egregious than the conduct for which the defendant was convicted. Indeed, the article quotes a number of highly respected members of the bar -- in this city and throughout the country -- who tacitly recognize a "seat of the pants quality" to the bills of attorneys. Id. at 62. And, while the defendant emphatically does not seek to justify the bills at issue in this case by billing practices and procedures of other attorneys, he asserts with equal emphasis that he should not be convicted of a federal felony for engaging in conduct which has never before been subjected to professional regulation in this manner. In short, he should not be made to pay for the fact that many members of our profession often submit unconscionably high bills, far in excess of those at bar.

orderly conduct would lose their jobs. [T. 777] And he explicitly stated that, in light of such considerations, he advised Carnivale that he would charge the union up to \$2,000 for each misdemeanor or violation which he handled and that Carnivale approved this figure.* [T. 925] The evidence corroborates that the only two instances alleged in the indictment in which Capanegro submitted bills greater than \$2,000 involved far more serious offenses than the twenty-two cases specified in the indictment involving bills of \$2,000 or under.

The defendant, a practitioner of criminal law in the criminal courts of New York City, testified extensively concerning the manner by which he calculated his bills and offered substantial other evidence concerning fees charged by other practitioners.** As the Court pointed out during

* By the evidence in the record, such figure was less than the amount charged per client by Cunningham & Kaming for similar services to union members involved in criminal charges during an earlier strike. [T. 767-69, 975-86; GX. 46A-F]. See, p. 9-10, infra.

** The defense called Richard D. Friedman, Esq. to testify concerning his knowledge of facts underlying Count 24. Mr. Friedman testified that although he only charged \$2,500 for obtaining dismissal in the McAleer matter, he would have asked an additional \$5,000 in order to represent the defendant at trial. Friedman also testified that, for a week-long criminal case in the Southern District of New York, he had received a fee of \$25,000 [T. 706-08] It is submitted that such figures are by no means unique either in state or federal courts. The fees asked by Mr. Friedman are clearly far greater than those asked by the defendant in the twenty-four instances of alleged overbilling set forth in the indictment.

trial, however, the Government adduced no proof whatsoever concerning a standard which it believed to apply to the facts at bar.* Instead, it simply argued that in each instance, Capanegro's bill greatly exceeded the amount which he was entitled to receive according to the work he performed. In making such argument, the Government ignored (a) Capanegro's clear testimony as to the basis for such bills; and (b) its own burden to demonstrate fraud beyond a reasonable doubt by proving that a billing standard existed by which to compare the defendant's bills and to prove them to have been fraudulently excessive.

Even more important, in the absence of evidence of any such standard, the Court itself endeavored to analyze such bill in terms of its own view of whether Capanegro's fee was excessive. Thus, in a number of instances the

* The Court said: "I am concerned, Mr. Buchwald, about this. It could be . . . that there would be relevant evidence comparing these billing practices or these amounts with some other amounts and billing practices either by Mr. Capanegro or by other lawyers, and so forth. I can see that. I can see almost expert testimony. I could see a lot of things, but one thing I can't see is sort of getting into it in a hit and miss way. If you intend or the defendant intends to put on evidence about comparison of these bills with other things, other bills or other standards, then I have got to insist on some systematic plan of how that is going to be done . . ." [T. 1204-5] The Government offered no such evidence.

Court apparently concluded that Capanegro should not have billed separately for each of several clients charged in the same disturbance. In Counts 2 and 3, the Court found that, having charged \$1,300 each for union members Lloyd Harold and Frank Carlo in the same case, Capanegro had written separate items "in order to inflate the amount of the bill." [A. 10] The Court made similar findings -- using almost identical language -- with respect to Counts 6 and 7, Count 11, and Counts 15-17. [A. 14, 20, 27] Indeed, Judge Griesa's analysis makes clear that the Court, in convicting on these counts, disregarded Capanegro's stated basis for setting a fee and applied its own rule-of-thumb that Capanegro was criminally responsible for charging separately with respect to each individual whom he represented. In Count 11, for example, the evidence established -- and the Court found -- that Capanegro had successfully appeared on behalf of two union members, had performed services on their behalf and had obtained a dismissal of the charges against them. He submitted separate bills for each client. The Court held:

"This is a situation in which Capanegro made a court appearance and achieved a successful disposition of a criminal case against [two] union members. Nevertheless, I find that the description of services in the Cassidy item was intentionally exaggerated, by referring to multiple court appearances and an actual

trial. Also the treatment of the Cassidy and Adler cases as two separate items was a device to inflate fees."* [A. 18]

And, with respect to Counts 15-17, the Court also convicted on the basis of three Capanegro bills submitted for services rendered to each of three separate clients. The uncontradicted evidence established that Capanegro represented three union members involved in a common arrest; that he appeared on behalf of each at their arraignments; that he sought -- but did not initially succeed in obtaining -- a dismissal of the charges; and that he ultimately obtained an ACD for each client. The Court, again applying its own formula for assessing the bills, convicted on all three counts, holding as follows: "I find that the separate itemization and the description of services was intentionally calculated to collect a grossly exaggerated

* With respect to the boilerplate language of the bills -- which the Court found to be fraudulent -- Capanegro testified [T. 1158-9] that his bill was dictated on January 20, 21, 1972, several days before the disposition of the cases on January 26. The submission of the bills -- along with approximately fifteen other items -- was on January 31, 1972. The court therefore disregarded the defendant's testimony that the bill was an in futuro projection and that its language contemplated services by the defendant which had not yet taken place at the time of dictation. See, post at .

total fee of \$5,700, which Capanegro knew he was not entitled to."* [A. 27]

The instances cited above illustrate an essential fallacy implicit in each count of the case. In asserting a theory that the defendant defrauded the union, the Government incurred a burden to establish beyond a reasonable doubt that, with intent to defraud, the defendant submitted bills to the Defense Fund which he knew to be unjustified. The Government adduced literally no evidence, through experts or otherwise, to prove the operative standard which should have dictated the amounts of the respective bills. The defendant, for his part, not only proved the basis for his bills but proved that in a comparable situation, another law firm -- that of Cunningham & Kaming -- had submitted a comparable bill. The Court, apparently applying its own standard, acquitted on some counts but convicted

* In a substantial number of counts, moreover, Judge Griesa acknowledged in his opinion that Capanegro was entitled to at least some compensation for his services. Specifically, the Court found in virtually every guilty count that such bills were "almost entirely statement[s] of services" not rendered by the defendant. [Emphasis supplied.] In one particularly notable instance, the Court found that the defendant "knowingly received payment beyond what he was entitled to" [A. 20] Such language makes clear that the Court conceded that the defendant was entitled to compensation in each case but differed as to the amount.

on other counts involving bills of approximately the same size. In short, the Court relied on no clearly defined standard by which to measure the bills submitted by the defendant. And, even more important, the prosecution utterly failed to demonstrate beyond a reasonable doubt that the bills in question so clearly exceeded an applicable standard as to prove that the defendant defrauded the union.

In this respect, it is appropriate to point out that 29 U.S.C. § 501 supplies a less drastic remedy than the criminal sanctions imposed in subsection (c). Both § 501 (a) and (b) authorize civil proceedings for the recovery of union funds allegedly misspent or misappropriated. The union's proper recourse in this case was a civil action under § 501 (a) and (b) to recover the difference between Capanegro's legal fees and the amount which it allegedly should have paid.* The imposition of criminal sanctions, however -- including disbarment upon conviction -- is especially harsh in light of (a) the absence of any billing standards; and (b) the government's failure to adduce proof of such standards and thus to establish fraud beyond a reasonable doubt.

* The defendant was subject of a civil action by the union for an accounting with respect to the legal fees which he received from Local 1101. The case was settled for \$5,000, and the union explicitly withdrew its previous allegations of fraud. [DX. C] See Point Four, infra.

- B. The evidence established that Carnivale, the President of Local 1101, knew and approved both of the services rendered by Capanegro, and the bills which he submitted for such services. The Government thus failed to prove that the union was defrauded.

The undisputed proof at trial established that the defendant Capanegro submitted his bills openly to the Defense Fund; that payments thereon were duly recorded on the union's books and explicitly approved by Richard Carnivale, the President of Local 1101; and that such bills related to actual cases in which the defendant in fact performed legal services for union members. In the face of such evidence, the Government argued that Capanegro had defrauded the union by knowingly submitting false bills. The evidence did not support such assertion.

We note at the outset that in every count on which the defendant was convicted, the Court found that Capanegro had intentionally submitted a fraudulent bill and that the defendant used the boilerplate language of his legal bills to deceive the union and to conceal the services which he had actually rendered each client in question. The evidence established, however, that Capanegro explicitly discussed his bills with the President of the Local, Carnivale, and that Carnivale approved each such payment. Indeed, the Government offered in evidence the checks by which Capanegro received payment for his services, all of which were duly signed by Carnivale and

many of which were written in his handwriting. It is therefore frivolous to assert that Capanegro obtained union funds by defrauding its President. Even more to the point, it should be noted that the Government bore the burden to establish that the union was deceived by Capanegro's bills. It called no union officer or director to so testify, nor did it adduce other evidence that the language of the bills deceived any responsible person at the union. In short, the Court relied upon the disparity between the language in the bills and the services which Capanegro rendered and it disregarded (a) that the union knew and approved of the payments; and (b) that the union president was in daily contact with Capanegro and knew of his activities. Thus, the Government failed in its burden to adduce evidence that the union was actually defrauded, and the Court erred in making such finding.*

* The Court credited Capanegro's testimony that he dictated bills as soon as a case came into his office and acquitted on Counts 13, 14, 18 and 19 on the basis that bills rendered in such cases were in futuro, good faith estimates of services to be rendered [A. 23, 24, 28, and 29] As is demonstrated in Point Three, infra, the Court took completely inconsistent positions with respect to such evidence, at times accepting Capanegro's testimony that such bills were good faith estimates of services, and at times rejecting such testimony. A fair reading of such testimony establishes, in any event, that the defendant dictated his bills as cases came into the office, and even though certain bills were dated later than the disposition of a particular case, they were invariably dictated before such case. The evidence hardly supported the inference of fraud which the Court erroneously drew. See Point Three, infra.

Point Three

THE COURT CREDITED CAPANEGRO'S TESTIMONY THAT HE HAD SUBMITTED IN FUTURO BILLS IN GOOD FAITH AND ACCORDINGLY ACQUITTED THE DEFENDANT ON FOUR COUNTS OF THE INDICTMENT; HOWEVER, ON IDENTICAL EVIDENCE THE COURT CONVICTED THE DEFENDANT ON THE REMAINING COUNTS. THE INCONSISTENT VERDICT IN A NON-JURY CASE MUST THEREFORE BE REVERSED

Throughout his testimony, the defendant testified unequivocally that his office practice was to dictate the language of each bill to his secretary as each case came into his office:

" . . .when a client came into my office or he called me on the phone and said, 'I have a problem,' I would take down the facts, because many of the times I was in court and I would then take the facts down, find out the court date and diary it, make up a file, open the file, and then advise the client, and send out or dictate a bill, and for what I projected I would do for the individual and what I anticipated." [T. 937; See also, T. 770-72, 942]

Indeed, the evidence corroborated such testimony. In a number of instances, the bill submitted to the union was dated before the scheduled court appearance yet recited the various legal services which by Capanegro's projection, would take place only in Court. The Court credited such testimony. In acquitting on Count 13, for example, Judge Griesa found as follows:

Califra was arrested January 19, 1972 and charged with disorderly conduct in connection with a strike-related incident. He was taken to the police station and told to appear in court February 7 for trial. Califra reported the problem to Carnivale, who called Capanegro. Califra also may have talked to Capanegro at this time. Capanegro appeared with Califra in court on February 7. After a brief appearance before the judge, the case was dismissed.

The bill of January 31 recites certain services, such as court appearances and trial which had not been performed as of that time. However, as already indicated, Capanegro has advanced the theory that certain of the bills were good faith estimates of services to be performed, although, of course, they were not actually phrased as such.

Giving Capanegro the benefit of every reasonable doubt, I find that the Government has not proved beyond such a reasonable doubt that the Califra item was not a good faith estimate of the kind Capanegro describes. [A. 22-3]

Moreover, the Court incorporated such reasoning by reference in acquitting Capanegro on Counts 14, 18 and 19. In crediting Capanegro's testimony on this crucial point, Judge Griesa explicitly found that, with respect to every bill submitted in futuro, the Government had not adequately established that Capanegro had intended to defraud the union at the time he submitted each bill. At the same time, however, the Court convicted with respect to a substantial number of counts in which the evidence established that the bill had been dictated in futuro. Indeed, all but three of the guilty counts involved instances in which Capanegro dictated bills at the outset of his repre-

sentation of a client and before the completion of services.* Thus, with respect to identical evidence concerning the defendant's billing procedures, the Court acquitted on some counts and convicted on the balance but supplied no rationale by which to distinguish the one group from the other.

This Circuit has long recognized the salutary rule requiring an appellate court to set aside inconsistent verdicts when such verdicts are rendered in non-jury cases:

"There is no need to permit inconsistency in the disposition of various counts so that the judge may reach unanimity with himself; on the contrary, he should be forbidden this easy method for resolving doubts. In civil cases inconsistencies in the findings of a judge are not tolerated . . . and inconsistencies even in jury verdicts may call for corrective action . . . We do not believe we would enhance respect for law by recognizing for a judge the same right to indulge in 'vagaries' in the disposition of criminal charges that, for historic reasons has been granted the jury . . ." United States v. Maybury, 274 F.2d 899 (2d Cir. 1960) (Friendly, J.) (citations omitted) See, United States v. Tankel, 331 F.2d 204 (2d Cir. 1964).

* Only with respect to Counts 15-17, relating to the defendant's successful representation of three men involved in a common incident, did the evidence establish that the bills were submitted after the completion of Capanegro's services. In that case, the Court found that Capanegro had made actual appearances on behalf of the defendants, had interviewed witnesses and successfully argued for ACD's for each client; the Court nevertheless convicted on the theory that, by billing the union for each client, Capanegro had fraudulently inflated his bill. [A. 26-27] See, infra, Point Two (A).

It is respectfully submitted that Judge Griesa indulged -- for whatever reason -- in precisely the sort of "vagaries" condemned by this Court in Maybury, supra. Without any apparent basis by which to make distinctions, he acquitted on four counts (thereby crediting Capanegro's testimony concerning in futuro billings) and convicted on Counts 1-3, 5-8, 10-12, and 21-24, in which the defendant's testimony on this subject was identical. The inconsistency may not be allowed to stand and requires a reversal of each such guilty count.

Point Four

THE SETTLEMENT OF THE CIVIL LAW SUIT AND
DISMISSAL WITH PREJUDICE OF ALL CLAIMS BY THE
UNION ARISING FROM THE PRECISE BILLS UNDERLYING
THE INSTANT CHARGES COLLATERALLY ESTOP THE
GOVERNMENT FROM PROSECUTING THE DEFENDANT.

The defendant testified without contradiction that, following substantial publicity concerning his legal fees and a subsequent election in which Carnivale was voted from office, a rival union slate, led by Ed Dempsey, caused a civil action to be filed by Local 1101 against Capanegro and Carnivale seeking restitution of the monies paid to Capanegro for his legal services and alleging that they had

been obtained by fraud.* The defendant testified that, after an acrimonious period in which union counsel declined to discuss this matter with him, the firm of O'Donnell & Schwartz, representing the union, reviewed the case with Capanegro, advised the defendant that it did not consider the union's position to be a meritorious one and agreed to settle the matter. The defendant offered in evidence a copy of the Stipulation of Discontinuance with Prejudice, ratified by Judge Frankel, [DX. C] and thus established that the civil case had been finally terminated and that the allegations of fraud had been explicitly withdrawn. [T. 866-871] The defendant asserted below -- and maintains in this forum -- that the disposition of the civil case collaterally estops the Government from presenting identical evidence to support identical charges in a criminal proceeding.

* The complaint, captioned Local 1101, Communications Workers of America, AFL-CIO v. Richard Carnivale and Michael J. Capanegro, 73 Civ. 3340, was filed in the United States District Court for the Southern District of New York pursuant to 29 U.S.C. §§ 501(a) and 501(b) on February 11, 1974. The Complaint seeks an accounting and restitution for, among other things, the same legal fees which were the subject of the indictment herein. Moreover, a brief reading of the complaint [DX. C] makes clear that the theory of the union was identical to that of the Government during the criminal trial.

For more than sixty years, collateral estoppel has been an established rule of federal criminal law. United States v. Oppenheim, 242 U.S. 85 (1916). Since Ashe v. Swenson, 397 U.S. 436 (1970), this rule has been recognized as an integral part of the Fifth Amendment's guarantee against double jeopardy. Simply stated, the rule provides that "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." Id., at 443. Under the holding in Ashe, double jeopardy is a constitutional bar not only to retrial for the same offense, but also relitigation of adjudicated issues whether contested in trials for the same or different offenses. Thus, the prosecution is foreclosed from relitigating in a subsequent trial any issue of ultimate fact determined in the defendant's favor in a prior proceeding.

All that need be shown is that the verdict in the earlier case necessarily decided that issues raised in the second trial. United States v. Cala, 521 F.2d 605, 608 (2d Cir. 1975); United States v. Gugliaro, 501 F.2d 68, 70 (2d Cir. 1974); United States v. Tramunti, 500 F.2d 1334, 1346 (2d Cir.), cert. denied, 419 U.S. 1079 (1974); United States v. Zane, 495 F.2d 683, 691 at n. 5 (2d Cir.),

cert. denied, 491 U.S. 895 (1974); United States v. Friedland, 391 F.2d 378, 382 (2d Cir.), cert. denied, 404 U.S. 867 (1971). This determination must not, however, be made in a "hypertechnical and archaic" manner, but with "realism and rationality." Ashe v. Swenson, supra, at 444. The inquiry "must be set in a practical frame and viewed with an eye to all the circumstances of the proceeding." Seafon v. United States, 332 U.S. 575, 579 (1948).

Moreover, the mere fact that the previous proceeding was civil in character does not affect the applicability of the doctrine of collateral estoppel. United States v. Dranow, 307 F.2d 545, 556 (8th Cir. 1962).

The similarity of the evidence and issues in the two cases was in itself sufficient to warrant a reversal of the conviction. United States v. Nash, 447 F.2d 1382 (4th Cir. 1971); United States v. Robinson, 418 F. Supp. 121 (D.Md. 1976); United States v. Drevetski, 338 F. Supp. 403 (N.D.Ill. 1972).

Even if this Court should conclude that the doctrine of collateral estoppel does not apply to the rather special facts of this case, the history of 29 U.S.C. § 501 suggests an additional reason why this Court should not permit the criminal prosecution of an individual who has already settled his differences with a labor union pursuant to the civil provisions of the statute. As pointed out above, [Point infra] § 501 was enacted to afford

unions a broad range of remedies against insiders who abused their trust. Central to such scheme were the accounting procedures set forth in § 501 (a) and (b). See generally, S. Rep. No. 187, 86th Cong., 1st Sess.; H.R. Rep. No. 741, 86th Cong., 1st Sess. (1959), U.S. Code Congressional and Administrative News. Capanegro was made the subject of such a proceeding and, in an arms-length settlement with counsel antagonistic both to him and to Carnivale, settled his quarrel with Local 1101 for \$5,000. This Court should not permit the criminal prosecution of a defendant who has litigated all of the same relevant fact issues in a proceeding under § 501(a) and (b) and has thus paid any arguable debt to the union and its membership. It is submitted that, in addition to the other reasons set forth above, consecutive prosecutions under first the civil, then the criminal provisions of § 501 does violence to the purposes underlying the passage of the Act and unfairly subjects the defendant to a series of trials which was not contemplated by the Congress.

Point Five

THE COURT ERRED IN CONVICTING THE DEFENDANT FOR FAILING TO MAKE REFUNDS TO THE UNION

With respect to a substantial number of Counts in the indictment, the Court found that Capanegro had

submitted the bills in question "knowing that it was almost entirely a statement of services which he had not rendered" [emphasis supplied] and, in at least two instances, the Court further found that the defendant "failed to send a corrected bill to Local 1101 or to refund to Local 1101" any of the moneys he had received. [A. 1-2, 8, 12, 14, 15, 16, 31, 32, 34, 35] Such language in the Court's special findings demonstrates that, in convicting the defendant, Judge Griesa essentially applied the civil doctrine of quantum meruit and convicted in those instances where, by a subjective standard, he believed that Capanegro earned too much from a particular case.

A fair analysis of the evidence shows that, in most instances in which the Court convicted, Capanegro did substantial legal work and was clearly entitled to a fee. Thus, with respect to Counts 11, 12, 15, 16 and 17, the Court found that the defendant had actually represented union members in court and obtained successful dispositions of their cases. [A. 18-22, 25-27] Nevertheless, the Court convicted Capanegro on such counts on the theory that his bills for such cases were exorbitant. Implicit in such findings was the Court's conclusion that Capanegro was entitled to some compensation for his efforts, a fact which is highlighted by the Court's acquittal of the defendant in instances where he represented union clients

in court and received fees of \$1,550 (Count 13), \$1,725 (Count 14), and \$1,450 (Count 19).

The facts set forth above -- drawn directly from the Court's special findings -- serve to emphasize that the verdict in this case was premised on a civil theory of recovery: in instances where the Court concluded that Capanegro had overbilled, the Court convicted; in instances where the facts on the record satisfied the Court that the bills were reasonable, the Court acquitted. And, most importantly, the Court, in convicting, found that the defendant had earned a part of his fee but not the entire amount set forth in the bill and therefore found that the defendant should have refunded a part of such fee.

Clearly the defendant should not have been held criminally accountable under a quantum meruit theory. Whether or not his bills were reasonable or excessive was properly the subject of civil litigation.* Moreover, by concluding, as it did, that Capanegro was criminally liable for submitting such bills, the Court created the real possibility that any attorney may be subjected to such sanctions simply because of an aggravated fee dispute. In the

* Indeed, the civil suit against Capanegro sought precisely the same quantum meruit sort of relief which Judge Griesa apparently believed was in order, and the defendant settled such dispute for \$5,000. More important, the union explicitly withdrew its prior allegations of fraud. See Point Four, infra.

absence of clearly articulated, universally applicable fee standards, such a result is intolerable, for it permits the trier of fact -- whether Court or jury -- to convict on a purely subjective basis.. Because the Court erroneously applied such a standard, the conviction must be reversed.

CONCLUSION

For the foregoing reasons, the trial court erred in concluding (a) that the defendant was an "employee" of Local 1101 within the meaning of the statute, and (b) that the Government had satisfied its burden of proving beyond a reasonable doubt that the defendant submitted legal bills to the union with intent to defraud. Accordingly, the judgment of conviction should be reversed and a judgment of not guilty entered with respect to Counts 1-3, 5-8, 10-12, 15-17 and 21-24.

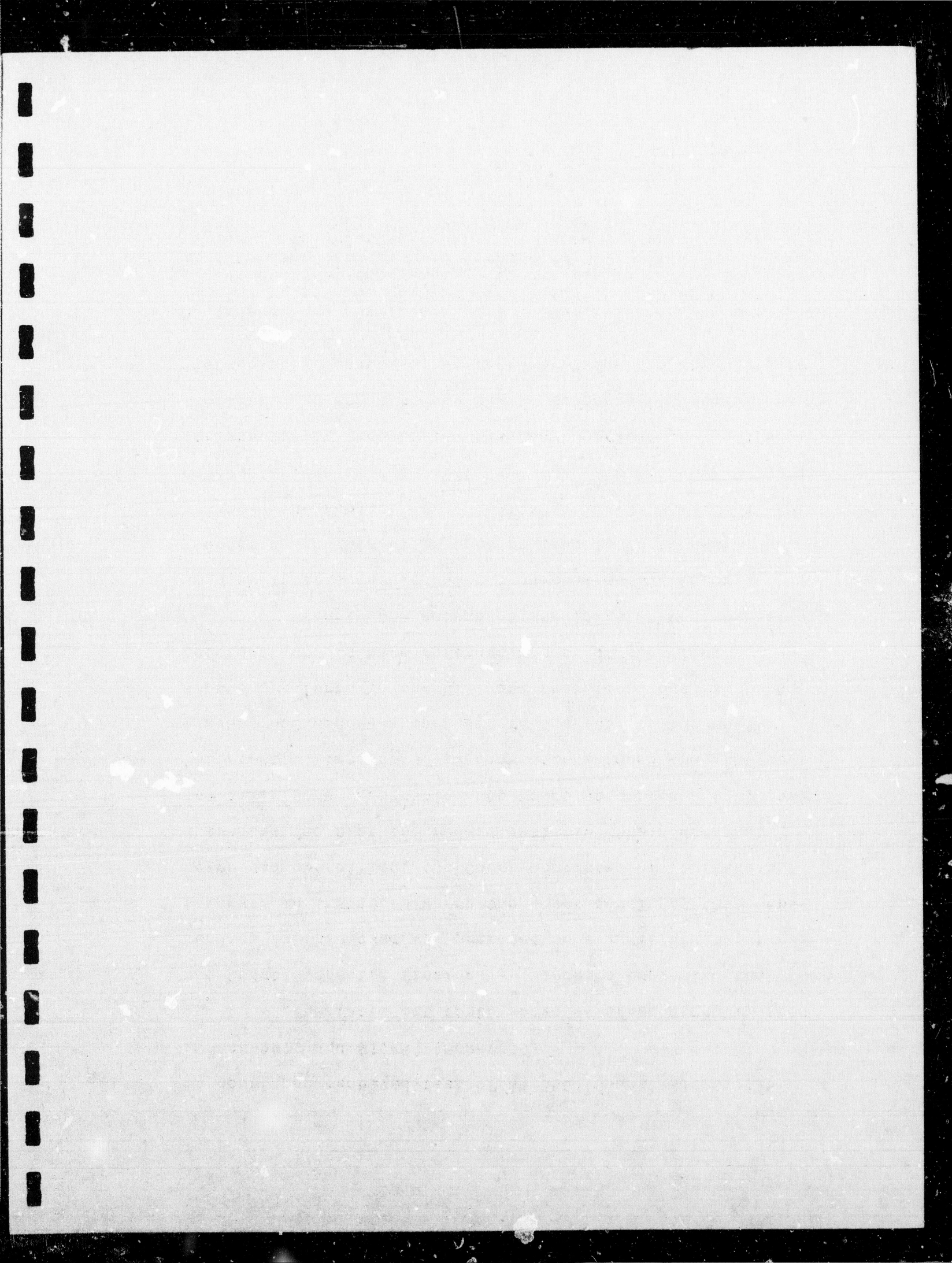
Respectfully submitted,

HENRY PUTZEL, III
Attorney for Defendant-Appellant
MICHAEL J. CAPANEGRO
140 West 62nd Street
New York, New York 10023
(212) 956-7144

Of Counsel:
Michael J. Capanegro,
pro se

Donna M. Zerbo, Law
Student Assistant

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ROBERT B. FISK JR.
U.S. ATTORNEY
SO. DIST. OF N.M.

